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HAROLD B. WILL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 334

NINA DYE WORKS CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

ENGEL, JUDGE, MILLER & STERLING,
Attorneys for Nina Dye Works, Inc., Petitioner.

Of Counsel:

DAN GORDON JUDGE,
JOHN F. REDDY, JR.,
JOSEPH M. MIDLER,

52 Vanderbilt Avenue,
New York 17, N. Y.

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NINA DYE WORKS CO., INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Nina Dye Works Co., Inc., the Petitioner herein, respectfully prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Third Circuit, which affirmed an order issued by the National Labor Relations Board ordering Petitioner to cease and desist from engaging in certain specified unfair labor practices.

Opinions Below

The Opinion and Order of the National Labor Relations Board (B. A. 216a-227a)[1] is reported at 95 N. L. R. B. 824. The original opinion of the Court of Appeals (R. A. 118a-123a) denying enforcement of the Board's Order is reported at 198 Fed. 2d 362. The per curiam order of this Court[2], dated February 2, 1953, granting a petition for a writ of certiorari made by the Board and reversing the judgment of the Court of Appeals is reported at — U. S. —, 73 S. Ct. 390. The subsequent opinion of the Court of Appeals (R. A. 141a-144a) granting enforcement of the Board's Order is reported at — Fed. 2d — (CCA3, No. 10,714, April 29, 1953).

Jurisdiction

The Decree of the Court of Appeals was entered on the 22nd day of June, 1953. Jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of Title 28, United States Code, and Section 10(f) of the National Labor Relations Act, 29 U. S. C. A. 160(f), as amended by the Labor Management Relations Act of 1947. Petitioner also relies on Rule 38, Paragraphs 5(b) and 5(c) of this Court for its grounds upon which this Petition is made.

Statutes Involved

Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A. Sections 141, et seq.[3]

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[1] The designations "R. A." and "B. A." refer, respectively, to the appendix to Respondent's brief below and the appendix to the Board's brief below, which together with the previous proceedings in this Court and the court below comprise the record herein.

[2] Quoted in full at page 5 herein.

[3] Pertinent sections of the Act are printed in the text as they are referred to, or are printed in the Appendix of this Petition.

Questions Presented

1. Does the standard of "substantial evidence" set forth as a measure of review in the Labor Management Relations Act require a reviewing Court to sustain an Order of the National Labor Relations Board unless the evidence clearly precludes the Board's decision from being justified or does it require the existence of sufficient evidence to so overbalance the scale in favor of the Board's conclusion that the reviewing Court must necessarily reach the same conclusion as that reached by the Board?

2. Was such standard of review properly applied to the facts herein by the Circuit Court of Appeals for the Third Circuit?

3. Does Section 10(c) of the Labor Management Relations Act prohibit the National Labor Relations Board from ordering the reinstatement of an employee where such employee has been discharged both for cause and for other reasons?

4. May the National Labor Relations Board issue a complaint alleging unfair labor practices which are not the subject of a charge?

5. Does Section 8(c) of the Labor Management Relations Act prohibit an employer from permitting and encouraging the circulation among its employees of an anti-union letter to a newspaper?

Statement

This matter arises out of charges of miscellaneous unfair labor practices filed by the Textile Workers Union of America, C. I. O. against the Respondent, Nina Dye Works Co., Inc.

Nina Dye Works Co., Inc. operates a business of dyeing and finishing synthetic fabrics in its plant at York, Pa.

There has been no union in the plant during the time it has been in operation and neither the Textile Workers Union of America, C. I. O. nor any other union has ever claimed representation of its employees.

The original charge (B. A. 3a-5a) was filed on July 11, 1949 and alleged (1) that the Respondent discriminated against Charles H. Miller and Ralph Ruby by discharging them in order to discourage membership in the Union and (2) that the Respondent interfered with, restrained and coerced employees by aiding and abetting the circulation of an anti-union petition (letter) in or about the week of June 27, 1949.

An amended charge (B. A. 6a-8a) was filed on September 26, 1949 by the Union. This was identical to the original charge with the exception of one additional sentence:

> "By the aforesaid acts and conduct and other acts and conduct, the Employer interfered with, restrained and coerced employees in the exercise of their rights."[1]

On June 8, 1950, a second amended charge (B. A. 9a-11a) was filed. This repeated the first amended charge verbatim, but added a specific allegation to the effect that Respondent had discriminated against employee Bosserman by reducing his hours because of his union activities.[2]

On June 29, 1950 a complaint was issued (B. A. 12a-16a) and a hearing was then held before a trial examiner. Subsequently, on July 31, 1951 after consideration of the trial

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[1] The charge was not further explained in spite of repeated requests in writing by Respondent's counsel for some indication of the nature and extent of the charges, if any, embraced by the additional sentence.

[2] The charge of discrimination against Bosserman was dismissed by the Board. This charge also repeated the cryptic reference to "other acts and conduct" but without any factual statement as required by the Rules and Regulations of the Board.

examiner's report and the briefs submitted by the Petitioner and the Board, there being no oral argument permitted, the Board issued its Decision and Order (B. A. 216a-227a).

Thereafter, the Board petitioned the Court below for enforcement of its Order (R. A. 109a-113a). The Court, without discussing the merits of the unfair labor practice findings save in connection with one point[1] and without discussing any of the legal points raised by Petitioner save one, set aside the Board's Order on the ground that compliance with the filing requirements prescribed by Section 9(f), (g) and (h) of the Labor Management Relations Act is a condition precedent to the filing of charges and, since the CIO was not in full compliance with such requirements when the charge and amended charge were filed, "the Board was without jurisdiction to issue its complaint" (R. A. 118a-123a).

The Board petitioned this Court for a writ of certiorari and on February 2, 1953 such petition was granted and the judgment reversed in accordance with the following order:

> "PER CURIAM: The petitions for writs of certiorari are granted and the judgments are reversed. National Labor Relations Board *v.* Dant, No. 97, October Term, 1952, decided this day."

Thereafter, the court below recalled its mandate and vacated its judgment (R. A. 140a). After reargument, without discussing any of the legal points raised by Petitioner but confining all discussions to the factual questions at issue, the court upheld the Board's order (R. A. 141a-144a).

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[1] After the CIO came into compliance, the Union filed its second amended charge (B. A. 9a-11a) on the basis of which the complaint further alleged, and the Board found, that the Company had interrogated employees concerning their interest in the Union, thereby violating Section 8(a)(1). The court below rejected this finding, declaring that the incident was of no legal consequence (R. A. 123a).

Reasons for Granting the Writ

I

The United States Court of Appeals for the Third Circuit has rendered a decision, which decision is in conflict with the decision of another United States Court of Appeals.

II

The United States Court of Appeals for the Third Circuit has decided a federal question in a way probably in conflict with the applicable decision of this Court and has so far miscomprehended or misapplied the standards of such applicable decision as to call for an exercise of this Court's power of supervision.

III

The United States Court of Appeals for the Third Circuit has decided important questions of federal law which have not been, but which should be, settled by this Court.

IV

The United States Court of Appeals for the Third Circuit has decided questions of general importance, or questions of substance relating to the construction and application of a statute of the United States which have not been, but which should be, settled by this Court.

The argument of Petitioner in support of this Petition for Writ of Certiorari covering each of the aforesaid reasons for the granting of this Writ will be set forth in detail

in the brief of Petitioner which is made a part of this Petition.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for review and determination on a date certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 10,714, *National Labor Relations Board, Petitioner* v. *Nina Dye Works Co., Inc., Respondent*, and that Petitioner may be allowed to present a complete brief on the merits of each of the questions raised herein and may have such other and further relief as may be just in the premises.

Respectfully submitted,

ENGEL, JUDGE, MILLER & STERLING

By: DAN GORDON JUDGE

DAN GORDON JUDGE,

Attorneys for Petitioner,
Nina Dye Works Co., Inc.

Of Counsel:

DAN GORDON JUDGE,
JOHN F. REDDY, JR.,
JOSEPH M. MIDLER,
52 Vanderbilt Avenue,
New York 17, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ------

NINA DYE WORKS CO., INC.,
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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITON FOR WRIT OF CERTIORAI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Statement of the Case

A statement of the case has already been given in the Petition and for purposes of brevity it will not be repeated here.

Errors Urged

1. The Circuit Court of Appeals erred in applying the required standard of review to the facts herein.

2. The Circuit Court of Appeals erred in sustaining the order of the Board to the extent that it required the reinstatement of two employees who had been discharged for cause.

3. The Circuit Court of Appeals erred in refusing to dismiss charges of unfair labor practices which were not the subject of a charge.

4. The Circuit Court of Appeals erred in sustaining the order of the Board to the extent that it prohibited Petitioner from permitting and encouraging the circulation among its employees of an anti-union letter to a newspaper.

Argument

I

The United States Court of Appeals for the Third Circuit has rendered a decision which decision is in conflict with the decision of another United States Court of Appeals.

This Court, in *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, has previously dealt with the problem of what criteria shall be used by a reviewing court to determine whether the National Labor Relations Board has complied with both the spirit and the language of the Labor Management Relations Act. Unfortunately, because of the nature of the problem, it is not possible to delineate the scope of review with any degree of mathematical clarity.

Essentially what Congress intended and what this Court has recognized in the *Universal Camera* case as the intent of Congress by the rule of review set forth in the Labor Management Relations Act is that the courts must assume a greater responsibility for the reasonableness and fairness of decisions rendered by the National Labor Relations

Board. This change of approach was brought about by commentary such as the following:

> "These clauses of the act have resulted in what the courts have described as 'shocking injustices' in the Board's rulings, 'asinine reasoning' by the Board, findings 'overwhelmingly opposed by the evidence,' findings that 'strain our credulity,' and 'remarkable discrimination' on the part of the Board in believing its own witnesses and disbelieving others." (From House Report on H. R. 3020, Legislative History of the Labor Management Relations Act, p. 332)

After consideration by this Court, the *Universal Camera* case was remanded to the Circuit Court of Appeals for the Second Circuit for reconsideration. Taking into consideration the change of approach required by the Congress and this Court, Mr. Chief Justice Learned Hand offered an additional commentary as he applied it to the facts found in the *Universal Camera* case:

> "By a divided vote we decided this appeal last year upon the same record that is now before us,[1] holding that the Board's order should be 'enforced.' The Supreme Court vacated our order and remanded the cause to us for reconsideration in two particulars. The first was that, although the amendment of the old act was in terms limited to adding that courts of appeal should scrutinize the whole record on reviewing findings of the Board, its implications were more extended. The second was that in considering whether the Board's findings were adequately supported by the evidence we were not altogether to disregard the findings of its examiner. As to the first, the Court agreed that in the case at bar we had based our review upon the whole record, but it held that the amendment had been a resultant of prolonged discussion in both Houses; and, although in form it did no more than incorporate what had always been the better practice—our own included—it was intended to prescribe an attitude in

[1] Footnotes omitted.

courts of appeal less complaisant towards the Board's findings than had been proper before; not only were they to look to the record as a whole, but they were to be less ready to yield their personal judgment on the facts; at least less ready than many at times had been. Presumably that does not extend to those issues on which the Board's specialized experience equips it with major premises inaccessible to judges, but as to matters of common knowledge we are to use a somewhat stiffer standard. Just where the Board's specialized experience ends it may no doubt be hard to say; but we are to find the boundary and beyond it to deem ourselves as competent as the Board to pass upon issues of fact. We hold that all the issues at bar are beyond the boundary and for that reason we cannot accept the Board's argument that we are not in as good a position as itself to decide what witnesses were more likely to be telling the truth in this labor dispute." (p. 430).

N. L. R. B. v. *Universal Camera Corp.*, 190 Fed. 2d 429.

The difference in approach and evaluation by Mr. Justice McLaughlin in the court below can be seen in the following quotation from his opinion:

"Despite strong evidence to the contrary, presented most capably on behalf of the respondent, particularly with respect to the discharge of Ruby and Miller, we cannot say that the record before us '* * * clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses * * *.' Universal Camera Corp. *v.* Labor Board, 340 U. S. 474, 490. As in that decision the evidence here in support of the Board's conclusions appears '* * * substantial when viewed on the record as a whole * * *.' The questions before us are factual. While conceivably we might have arrived at a different result than the Board in the first instance, we are bound by its findings based as they are on substantial evidence." (R. A. 144a).

An attempt is made to follow the language of this Court found in the *Universal Camera* case but in attempting to

do so it is believed that the spirit of their application has been lost and the fundamental intent of this Court, as interpreted by Mr. Chief Justice Learned Hand, has been misapplied. Mr. Justice McLaughlin clearly implies his doubt in the findings of the Board to such an extent that he might have reversed were it not for his deference to the formula of factual questions. At the same time he chooses to use as a yardstick the facts of the *Universal Camera* case which Mr. Chief Justice Learned Hand found were not supported by substantial evidence when viewing the record as a whole.

The approach used by Mr. Justice McLaughlin is the same approach used by Mr. Justice Orr in somewhat more explicit terms in the case of *N. L. R. B.* v. *West Coast Casket Company, Inc.* (CCA 9, No. 13,515, June 30, 1953). The commentary offered was as follows:

> "This case may be termed 'close' in the sense that not *all* the substantial evidence in the record supports the findings of the Board. Indeed, if we had been in the position of the trial examiner, we might perhaps have found for the respondent. However, we find apropos the Supreme Court's statement that the rule that the findings of the Board must be supported by substantial evidence on the record considered as a whole does not 'mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it *de novo*.' *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488 . . ."
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> • • •
>
> "We hold that the factual picture of respondent's conduct constitutes substantial if indirect evidence on the record considered as a whole supporting the Board's finding . . ."

The question of which approach to judicial review is the proper one should be settled by this Court to the extent that it is possible to do so. It affects every case brought

by the National Labor Relations Board and the failure to clarify it will make the question of an employer's rights under the Labor Management Relations Act dependent upon what Circuit of the United States Court of Appeals the employer may find his case.

II

The United States Court of Appeals for the Third Circuit has decided a federal question in a way probably in conflict with the applicable decision of this Court and has so far miscomprehended or misapplied the standards of such applicable decision as to call for an exercise of this Court's power of supervision.

In the interests of brevity Petitioner has limited this discussion to four factual points which illustrate the misapplication of the standard of review.

1. One of the chief witnesses for the Board was a man named Tate. In the course of the hearing it was developed that he made a number of admittedly contradictory statements in his testimony (R. A. 17a-18a), he left the Petitioner's employ under circumstances which would normally give rise to a considerable amount of prejudice against Petitioner (R. A. 20a-21a), he misrepresented his role in connection with an anti-union letter at issue and was contradicted not only by witnesses for Petitioner but by witnesses for the Board (R. A. 25a, 26a, 27a-28a, 49a and 55a), he misrepresented conversations with a foreman which was contradicted by witnesses testifying on behalf of the Board (B. A. 42a-43a, R. A. 36a-37a, 50a and 79a) and facts concerning his personal life showed him to be completely unreliable and untrustworthy (R. A. 20a-21a, 87a-88a).

In resting a major portion of its case on the testimony of this witness the Board discounts all such indicia of unreliability and dispute concerning the facts by charac-

terizing it as an "imperfect recollection" or "exaggeration" (B. A. 218a). It then proceeds to announce that it credits such witness' testimony and thereby discredits the testimony of nine witnesses, a number of whom were witnesses offered by the Board as credible witnesses.

2. The Board has charged that an employee by the name of Ruby was discharged for Union activities and ordered his reinstatement. The Petitioner offered evidence through the testimony of eight witnesses, including the testimony of Mr. Tate, the witness previously referred to herein, that Mr. Ruby was fired for incompetence (R. A. 74a-75a, 64a-68a, 14a-15a, 16a, 106a, 81a-84a, 70a-71a, 55a-59a and 60a-62a).

Despite the fact that Mr. Ruby was discharged before he had completed ten weeks of employment with Petitioner, the Board dismissed the testimony of eight witnesses with the following comment:

> ". . . If this testimony were to be credited, it would appear that the quality of Ruby's work had been so bad that he would hardly have been retained until the June 15 incident." (B. A. 219a).

The court below agreed with the Board that the Petitioner discharged Mr. Ruby because of his Union activities. A reference to the record discloses that Mr. Ruby specifically denied that he had engaged in any Union activity:

> "Q. Ruby, were you organizing for this union in the plant?
> A. No, sir.
> Q. You were going around from man to man asking them to join the union?
> A. No, sir.
> Q. Did you go around from man to man and tell them about the benefits of the union?
> A. No, sir.
> Q. Did you ever talk to anybody about the union other than Art Tate and Charley Miller?
> A. No, sir.

Q. Did you sign up any men on the blue cards in the dye house?

A. No, sir.

Q. Did you give out any union literature?

A. No, sir.

* * * * * *

"Q. Did you ever tell anybody at all employed by Nina Dye Works that you were a member of the Union?

A. No, sir.

Q. Did you ever go to any Union meetings in June of 1949?

A. There wasn't any around to go, no.

Q. Did you ever go to any Union meetings in May, 1949?

A. No, sir.

Q. Did you ever go to any Union meetings at all?

A. No, sir." (R. A. 53a-54a).

3. A second important witness of the Board was a man named Fauth. A number of charges are predicated on the testimony of Mr. Fauth and the basis upon which the trial examiner was constrained to believe Mr. Fauth and disbelieve Mr. Rhodes, the president of Petitioner, was as follows:

> ". . . Because I have previously found Fauth to be a credible and trustworthy witness, I further credit Fauth's above testimony regarding this conversation with Rhodes and find that Rhodes not only interrogated Fauth concerning his Union sympathies, but also threatened to close the plant if the Union organized it." (B. A. 178a).

It may be noted that this written conclusion was in distinct contrast with the conclusions of the Board counsel and the trial examiner at the trial itself where they both questioned the probative value of Mr. Fauth's testimony thusly:

Comment by the Representative of the Board:

> "Mr. Examiner, the witness has answered 'probably did' and 'I imagine that is how it started'. I would appreciate it if you would instruct the witness

not to imagine or presuppose but to state what he knows or what he remembers, and if he doesn't remember, to say he doesn't remember. I don't see any substance in probabilities or imagining." (R. A. 32a).

Examiner's reply:

"Well, it is probable that the testimony left in that state would have very little weight". (R. A. 32a).

Further comment by the Representative of the Board:

"Mr. Examiner, I would like to know what he means by the words 'I guess'. Does the Examiner believe that would have any probative value?" (R. A. 32a).

4. One of the two employees discharged was a man named Charles Miller. The Board has charged that Mr. Miller was discharged for union activities and, in the course of such proof, the Board attempted to prove, through Mr. Miller's testimony, that he was a member of the union. Mr. Miller's testimony concerning this point was a maze of contradictions which can be summarized as follows:

A. (1) Miller signed the union card before he ever went to work at the plant (R. A. 37a-38a);

(2) Miller signed the union card after he started working at the plant (R. A. 37a, 45a-46a);

(3) Miller is not sure when he signed the union card (R. A. 46a, 48a-49a);

(4) Miller lied when he said that he had signed the union card before he started working (R. A. 49a).

B. (1) Miller met a union organizer named Ryan at the Steelworkers Union before he started to work at the plant (R. A. 40a);

(2) Miller never met Ryan until he met him at the plant distributing union literature (R. A. 43a, 48a-49a);

(3) Miller isn't sure of whether he ever talked to Ryan before he met him at the plant (R. A. 45a);

(4) Miller does not remember at all (R. A. 48a).

C. (1) Miller went to Steelworkers Union Hall and signed a union card before he was employed (R. A. 39a);

(2) Ryan handed Miller a union card to sign while Miller was leaving work (R. A. 45a-46a).

From this maze of contradictions the trial examiner obtained *substantial evidence* by means of the following note:

> "Miller's card, in evidence, bears the date of May 12, 1949. The record shows that he was not employed until May 18, but since he credibly asserted, in the opinion of the undersigned, that he signed it during the time he was employed, I find that it was signed on some date later than May 12, 1949, and before he was discharged." (B. A. 166a).

To add one further fact to the picture, a demand was made at the hearing itself for the union card discussed. Neither Mr. Miller nor the Board representative nor the union representative could produce the card until the following day, at which time the union representative produced the card to confront the witness.

The evidence referred to above in connection with the four examples of factual questions is typical of the evidence used by the Board to sustain its findings. At this point it would be inappropriate to review the methods and means by which much of this evidence was introduced. This must be left for a more extensive brief.

However, by sustaining the Board despite very serious misgivings the court below has demonstrated that the tests intended by Congress and this Court are not being complied with. As a practical matter what the court below has done and what a number of other courts have done since the passage of the Labor Management Relations Act is to

endorse the theory that the Board may not rest its findings on inferences drawn from its theoretical background of expertise, on hearsay evidence and on reasoning alone but they have then proceeded to permit the Board to sustain its position by the use of nominal evidence and indirect evidence (See e.g. *N. L. R. B.* v. *West Coast Casket Co., Inc.*, previously referred to at page 13) and thereby translate such evidence into *substantial evidence* by the application of the formula of credibility, although the conclusions concerning credibility are not within the realm of a non-judicial expert. This *substantial evidence* is then accepted by the courts below despite the existence of *substantial evidence* to the contrary simply because the Board has so decreed it.

It is submitted that this approach was not the one intended by Congress or this Court.

III

The United States Court of Appeals for the Third Circuit has decided important questions of Federal law which have not been, but which should be, settled by this Court.

IV

The United States Court of Appeals for the Third Circuit has decided questions of general importance, or questions of substance relating to the construction and application of a statute of the United States which have not been, but which should be, settled by this Court.

There are three problems which arise in connection with these points.

First, Does Section 10(c) of the Labor Management Relations Act prohibit the National Labor Relations Board from ordering the reinstatement of an employee where such

employee has been discharged both for cause and for other reasons?

Second, May the National Labor Relations Board issue a complaint alleging unfair labor practices which are not the subject of a charge?

Third, Does Section 8(c) of the Labor Management Relations Act prohibit an employer from permitting and encouraging the circulation among its employees of an anti-union letter to a newspaper?

1. In connection with the problem of whether the Board possesses the authority to order the reinstatement of an employee where such employee has been discharged in part for cause, Section 10(c) of the Labor Management Relations Act is clear and unequivocal. The pertinent portion of said section reads as follows:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."[1]

In its decision the Board disposes of this problem, as it affects one discharged employee, by discrediting the testimony of eight witnesses, including one of its own witnesses (which it credits in all other respects) and a witness who was not employed by the petitioner with the comment:

> "If this testimony were to be credited it would appear that the quality of Ruby's work had been so bad that he would hardly have been retained until the June 15th incident."

It then concludes that Ruby's work was satisfactory.[2]

The court below limits its comments to noting that based upon the evidence found credible by the Board, Ruby was

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[1] The entire text of this section is quoted in the appendix herein.

[2] Citations to record are set forth at page 15 where this point has previously been discussed in another context.

discharged because of his union activities (R. A. 144a). It does not consider the problem of whether in this instance the employee was discharged in part for cause and it does not contemplate any review of the Board's judgment concerning credibility.

The issue of whether the Board has the power to order the reinstatement of an employee where he has been discharged in part for cause is of considerable importance to employers in the protection of their rights under the Labor Management Relations Act. No reported cases have been found dealing with this problem and its solution would assist in not only reaching a fair and reasonable determination in this matter but would serve as a guide for other courts who must necessarily be faced with the problem on frequent occasions.

2. The problem of whether the Board may issue a complaint alleging unfair labor practices which are not the subject of a charge is of substantial importance because of the abuses which can and do arise, whether intentionally or unintentionally, in the course of the administration of the Labor Management Relations Act.

Section 10(b) of the Act deals with this problem and the pertinent provision reads as follows:

> ". . . that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."[1]

The position of the Board is that the sole purpose of the charge is to set the investigative machinery of the Board in action. If in the course of such investigation it discovers other acts which it believes to be unfair labor practices it may issue a complaint covering such acts without any charge referring to such acts and without any prior notice to or discussion with an employer.

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[1] The entire text of this section is quoted in the appendix herein.

The consequences of this position can be seen in this matter. The original charge (B. A. 3a-5a), dated July 11, 1949, alleged that the petitioner had discriminatorily discharged Ruby and that the petitioner had interfered with, restrained and coerced its employees by aiding and abetting the circulation of an anti-union petition (letter) in June 1949. This charge was amended by a charge (B. A. 6a-8a), dated September 26, 1949, which added the sweeping conclusion that "By the aforesaid acts and conduct and other acts and conduct, the employer interfered with, restrained and coerced employees in the exercise of their rights." All efforts on the part of the petitioner and its counsel to obtain information from the Board concerning "other acts and conduct" were of no avail. The complaint (B. A. 12a-16a) was issued June 28, 1950, approximately one year after the charge was filed, and it too failed to apprise the petitioner of what facts it was being charged with. Subsequently a demand for a bill of particulars failed to obtain all the facts (B. A. 20a-26a).

Thus the first time the petitioner was faced with all the charges was at the time of the hearing by which time the burden of investigation and obtaining additional evidence was prohibitive.

By inserting a requirement that a charge be filed within six months from the date of the occurrence of the alleged unfair labor practice, Congress intended not only to relieve the Board of the duty of investigating timeworn problems but it intended to accord employers an opportunity to meet charges while witnesses are available, memories are fresh and records have not been destroyed.

It is petitioner's position that such protection to employers has been lost in the administrative processes of the Board and it requires the consideration and intervention of this Court to place the administrative processes of the Board back on the right path.

3. Some of the problems of employer free speech under the Labor Management Relations Act have been considered

in the past by this Court. In this instance the problem arises as to whether an employer may permit and encourage the circulation among its employees of an anti-union letter to a newspaper.

Section 8(c) of the Labor Management Relations Act reads as follows:

> "The expressing of any powers, argument or opinion, or the discrimination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of force or promise of benefit."

The position of the Board is that such action constitutes interrogation. The court below apparently agreed with the Board although it confines its comments to noting that the evidence credited by the Board supports the argument that petitioner's motive in permitting and encouraging circulation was to ascertain the attitude of the employees to the union (R. A. 144a).

It is admitted that the letter in question contains no threat of reprisal or force or promise of benefit (B. A. 152a-154a), that it was originally a spontaneous expression of anti-union sentiment by the employees (B. A. 220a), that the letter had passed through the hands of at least 50% of the employees in the plant before any company representative is even alleged to have seen it (B. A. 220a).

Under such circumstances, it seems clear that any action taken by the petitioner in connection with such letter was within the privileged status provided to employers by Section 8(c) of the Act.

Conclusion

We respectfully urge upon this Court the importance of the problems represented by this case and the urgent need for a decision by this Court on the subject.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for review and determination on a date certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 10,714, *National Labor Relations Board, Petitioner* v. *Nina Dye Works Co., Inc., Respondent,* and that Petitioner may be allowed to present a complete brief on the merits of each of the questions raised herein and may have such other and further relief as may be just in the premises.

Respectfully submitted,

ENGEL, JUDGE, MILLER & STERLING

By: DAN GORDON JUDGE

DAN GORDON JUDGE,

Attorneys for Petitioner,
Nina Dye Works Co., Inc.

Of Counsel:

DAN GORDON JUDGE,
JOHN F. REDDY, JR.,
JOSEPH M. MIDLER,

52 Vanderbilt Avenue,
New York 17, N. Y.

Appendix

Statutes

Labor Management Relations Act, 1947, 61, Stat. 136, 29 U. S. C. Supp. I, Sections 141, et seq.

"Sec. 10.

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument.

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the

unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."